In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1355

EDWARD FRANCIS KUNTZWEILER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was insufficient evidence to sustain his conviction for conspiracy.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to manufacture amphetamines and methamphetamines, in violation of 18 U.S.C. 371 and 21 U.S.C. (1964 ed. Supp. IV) 360a(a). He was sentenced to four years' imprisonment, with immediate eligibility for parole under 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A 1-4).

In late February 1969, petitioner and Gary Brazil purchased laboratory equipment and chemicals, including

phenol-2-propanone, from Gary Payne,[1] a buyer for Clico Scherer, a laboratory supply company (Tr. 61-64, 83-85, 88-89).[2] Petitioner told Payne that he intended to use the phenol-2-propanone for leather work (Tr. 63-64). Payne delivered the materials to petitioner at his clothing shop and was paid in cash by Brazil (Tr. 64-65, 79, 85). At that time petitioner asked Payne if he could purchase other chemicals and laboratory equipment and have the sales slips marked "cash" instead of using his name on the slips (Tr. 81-82).[3] About ten days later, petitioner again met with Payne and Brazil (Tr. 82, 85-86). Two weeks later Payne delivered more phenol-2-propanone to petitioner (Tr. 82, 86-87). Another meeting with petitioner and Brazil was held early in July to discuss petitioner's failure to pay for the equipment he had purchased (Tr. 87-88).

Petitioner told Payne privately that the chemicals could be used to manufacture "speed" (Tr. 91). Petitioner stated that he was spending a lot of time trying to track down the proper formula and offered Payne some of the drug as payment for the equipment and materials purchased (Tr. 92). Payne testified that he rejected speed as payment but continued to supply petitioner for three more weeks (Tr. 93).

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[1]Brazil was indicted with petitioner, but the charges against him were subsequently dropped. Payne was named in the indictment as an unindicted co-conspirator.

[2]"Tr." designates the trial transcript, a copy of which is being lodged with the Clerk of this Court.

[3]Subsequent sales slips for goods sold to petitioner by Payne were made out to cash (Tr. 67-76, 88).

On April 28, 1969, during petitioner's dealings with Payne, Payne asked Edward Goldstein, a seller of scientific equipment and chemical supplies, to obtain a condenser for petitioner (Tr. 18-20, 23-24, 26, 120). Petitioner subsequently telephoned Goldstein to ask if the condenser had arrived (Tr. 25). Petitioner later was driven to Goldstein's office in an El Dorado Cadillac (Tr. 29-30).[4] At that time, Goldstein gave petitioner a catalogue of his goods, and on May 6th or 7th petitioner called on Goldstein and ordered more condensers and a distillation column, stating that he wanted to dabble in chemistry, and was working on a process that would make him a lot of money (Tr. 30-31, 33). The merchandise was eventually delivered and paid for in cash (Tr. 26-28, 31).

On August 8, 1969, a search of petitioner's apartment and basement storage area pursuant to a search warrant revealed chemical formulae, some sales slips from Clico Scherer, chemical equipment, and numerous bottles containing chemicals (Tr. 127, 134-135, 138, 155, 160-163, 165, 168-169, 170-171, 186-188, 190-192, 200-203). Petitioner was thereupon arrested (Tr. 164). Lucian P. Haag, supervisor of the crime laboratory for the City of Phoenix, examined the notes and chemical formulae found in the search (Tr. 185, 195-196). He testified that the formulae were for methamphetamine, a variant of amphetamine containing phenol-2-propanone, a chemical whose only use is in the manufacture of amphetamines (Tr. 196-197). Phenol-2-propanone, formic acid, and methylene, all used in the manufacture of amphetamines, were seized from petitioner's apartment (Tr. 203-204). Haag estimated that the 12,500 grams of

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[4]Payne testified that Brazil drove a 1969 El Dorado (Tr. 84).

phenol-2-propanone seized from petitioner's premises could have been used to manufacture amphetamines worth $600,000 (Tr. 205).

Petitioner did not testify or present any witnesses on his behalf. The facts set forth above provide ample evidence from which a jury could have found beyond a reasonable doubt that a conspiracy existed. Payne, Brazil and petitioner were all involved in the purchase and sale of materials that could only be used in the manufacture of illegal drugs. They jointly decided to falsify sales records to conceal the name of the purchaser. Petitioner offered to pay Payne in illegal drugs, and Payne, though declining the offer, continued to supply petitioner with the necessary materials. The items found in petitioner's apartment were strong evidence that the manufacture of amphetamines was contemplated.

Viewed in the light most favorable to the government, the evidence was thus sufficient to sustain petitioner's conviction. See *Glasser* v. *United States,* 315 U.S. 60, 80.

The fact that Payne was not indicted and that the charges against Brazil were dropped does not affect petitioner's conviction, since one can be convicted of conspiracy even though the indictment against all the other conspirators has been dismissed. *Feldstein* v. *United States,* 429 F. 2d 1092, 1095 (C.A. 9), certiorari denied, 400 U.S. 920; *Kitchell* v. *United States,* 354 F. 2d 715, 719-720 at n. 8 (C.A. 1), certiorari denied, 384 U.S. 1011.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.